

CC:NER:BRK:TL-N-5396-00
REGole

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from: Associate Area Counsel-Brooklyn (CC:LM:FSH:BRK)

subject:

EARLIEST STATUTE OF LIMITATIONS: December 31, 2000

DISCLOSURE STATEMENT

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

We request that you refer to the enclosed Informal Field Assistance for the language of the caption and the signature block. The proposed language incorporates each of the separate mergers effecting [REDACTED] and each of its successors. In addition, the National Office has further opined that [REDACTED] is also liable as a successor under Delaware law.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702. We are closing our file at this time.

JODY TANCER
Associate Area Counsel
Brooklyn

By: _____
ROSE E. GOLE
Attorney

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:BRK:TL-N-5396-00
REGole

date:

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Attn: Revenue Agent Andrew Vilardi (Group 1042)

from: Associate Area Counsel-Brooklyn (CC:LM:FSH:BRK)

subject:

UIL: 1502.77-00

EARLIEST STATUTE OF LIMITATIONS: December 31, 2000

This is in response to your request for advice as to who is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) for the subject taxpayer for the years [REDACTED] and [REDACTED]. You further requested our assistance in providing the proper language to use on the Form 872.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

FACTS

The facts, as we understand them to be, are as follows:

[REDACTED] ([REDACTED]) and subsidiaries, a consolidated group, hereinafter, "[REDACTED]," is under audit for the [REDACTED] and [REDACTED] taxable years. [REDACTED], a foreign corporation, was the sole shareholder of [REDACTED]. On [REDACTED], [REDACTED] merged with and into its wholly owned subsidiary [REDACTED] ([REDACTED]), hereinafter "[REDACTED]." [REDACTED] surrendered [REDACTED]% of the common stock of [REDACTED] and was issued [REDACTED] shares of common stock ([REDACTED]%) of [REDACTED]. [REDACTED] further received shares of [REDACTED], hereinafter "[REDACTED]," its wholly owned subsidiary. [REDACTED] became a wholly owned subsidiary of [REDACTED].

Also on [REDACTED], [REDACTED] merged with and into [REDACTED] ([REDACTED]), hereinafter "[REDACTED]." [REDACTED] was a wholly owned subsidiary of [REDACTED]. As a result of the merger, all [REDACTED] shares were canceled and [REDACTED] owned all shares of its own stock previously held by [REDACTED]. Furthermore, [REDACTED] received shares of stock in [REDACTED], hereinafter "[REDACTED]". [REDACTED] became a wholly owned subsidiary of [REDACTED].

[REDACTED]'s [REDACTED] plan of reorganization further stated that the successive downstream mergers of [REDACTED] into [REDACTED] and then into [REDACTED] were intended to constitute tax-free reorganizations under I.R.C. § 368(a)(1)(D) and § 354.

[REDACTED] filed a consolidated tax return for the period of [REDACTED] through [REDACTED] as the new common parent of the [REDACTED] consolidated group.

In a further series of transactions [REDACTED] sold its interest in [REDACTED] to [REDACTED]. [REDACTED] then made a distribution of its remaining reserves to [REDACTED]. [REDACTED] distributed all of its reserves to [REDACTED]. [REDACTED] and [REDACTED] were formally liquidated. The plan of reorganization indicates that check the box elections would be made to disregard [REDACTED] and [REDACTED] for federal income tax purposes under Treas. Reg. § 301.7701-3.

On [REDACTED], [REDACTED] merged with and into [REDACTED] ([REDACTED]), hereinafter "[REDACTED]". [REDACTED] is a wholly owned subsidiary of [REDACTED] ([REDACTED]). [REDACTED] owned [REDACTED]% of the capital stock of [REDACTED]. It was incorporated as a Delaware corporation on November 30, 1999, apparently for the purpose of transferring [REDACTED] into the [REDACTED] group via a merger of [REDACTED] with and into [REDACTED]. Coincident with the merger, [REDACTED] changed its name to [REDACTED], "new [REDACTED]". On [REDACTED], "new [REDACTED]" changed its name to [REDACTED].

[REDACTED] changed its name to [REDACTED].
[REDACTED] filed a consolidated return for the
period from [REDACTED] through [REDACTED].¹

DISCUSSION

The common parent is the highest tier domestic corporation. I.R.C. § 1504(a). Generally, the common parent, in its own name, is the sole agent for each subsidiary in the group, duly authorized to act in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985). The common parent in its name may execute waivers, which are binding upon each of its subsidiaries. Generally the common parent is the proper party to execute consents, including Forms 872, on behalf of all members of the consolidated group.

Temp. Treas. Reg. § 1.1502-77T provides "alternative agents" for the affiliated group for the purpose of mailing notices of deficiency and executing waivers of the statute of limitations. Treas. Reg. § 1.1502-77T is effective for waivers of the statute of limitations for consolidated returns due after September 7, 1988. "[The] section applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence under §1.1502-75(d)." Treas. Reg. § 1.1502-77T(a)(1).

Treas. Reg. § 1.1502-77T(a)(4)(iv) sets forth which corporations may act as alternative agents for the common group. The regulation provides that, "If the group remains in existence under §1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given" may act as alternative agent.

Pursuant to Treas. Reg. § 1.1502-75(d)(2), although the common parent ceases to exist, the consolidated group is treated as remaining in existence under the following circumstances:

(2) *Common parent no longer in existence--(i) Mere change in identity.* For purposes of this paragraph, the common parent corporation shall remain as the common parent irrespective of a mere change in identity, form, or place of organization of such common parent corporation (see section 368(a)(1)(F)).

¹. You have not provided our office with any information regarding the ownership of [REDACTED] or the members of the consolidated group.

(ii) *Transfer of assets to subsidiary.* The group shall be considered as remaining in existence notwithstanding that the common parent is no longer in existence if the members of the affiliated group succeed to and become the owners of substantially all of the assets of such former parent and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation and which was a member of the group prior to the date such former parent ceases to exist. For purposes of applying paragraph (f)(2)(i) of §1.1502-1 to separate return years ending on or before the date on which the former parent ceases to exist, such former parent, and not the new common parent, shall be considered to be the corporation described in such paragraph.

The facts, as we understand them, indicate that on [REDACTED], [REDACTED] underwent a series of downstream mergers into [REDACTED] and ultimately into [REDACTED]. This appears to be the type of reorganization contemplated by Treas. Reg. § 1.1502-75(d)(2)(ii). [REDACTED] and then [REDACTED] were members of the affiliated group of [REDACTED] and succeeded to its assets. Accordingly, for the period between [REDACTED] and [REDACTED], [REDACTED] was the alternative agent under Treas. Reg. § 1.1502-77T(a)(4)(iv).

As of [REDACTED], [REDACTED] merged with and into [REDACTED]. [REDACTED] changed its name twice, first to [REDACTED] and then to [REDACTED]. The name changes do not effect the determination of who is the common parent since the common parent is deemed to remain in existence irrespective of a mere change in identity. Treas. Reg. § 1.1502-75(d)(2).

Although we do not believe the facts demonstrate that the merger of [REDACTED] with [REDACTED] falls under Treas. Reg. § 1.1502-75(d)(2) or (d)(3), we nonetheless conclude that [REDACTED] is an alternative agent under Treas. Reg. § 1.1502-77T(4)(i). This is because the successor to the former common parent in a transaction to which I.R.C. § 381(a) applies is also an alternative agent under the provisions of Treas. Reg. § 1.1502-77T(a)(4)(ii). Section 381(a) cross-references liquidations of subsidiaries under I.R.C. 332 and reorganizations under I.R.C. section 368(a)(1)(A)(C)(D)(F) or (G). Since it appears that [REDACTED] is a successor to [REDACTED] in a transaction to which section 381 applies, we conclude that it may act as an alternative agent for the period commencing after [REDACTED].

[REDACTED], formerly [REDACTED], filed the most recent consolidated return for the common group, including [REDACTED]. The common parent of the group at the time the waiver is given is also an alternative agent if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or

(3). Treas. Reg. § 1.1502-77T(4)(iv). We do not believe the facts, as we understand them, support a finding that the group remained in existence under the pertinent regulation provisions. Accordingly, we are unwilling to conclude at this time that [REDACTED] could also act as an alternative agent.

3. Drafting and Executing the Form 872.

A corporation's income tax return must be signed by a duly authorized officer, including the president, vice-president, treasurer, assistant treasurer, or chief accounting officer. I.R.C. § 6062. The signature of an officer on a return is prima facie evidence that he is authorized to sign the return. I.R.C. § 6062. The Service applies these rules to the execution of consents. Rev. Rul. 83-41; Rev. Rul. 84-165. An authorized officer should execute the Form 872 by signing his name and his official title at [REDACTED]

The caption on the Form 872 should read "[REDACTED] [REDACTED], formerly known as [REDACTED] and [REDACTED], alternative agent and successor of [REDACTED]." In addition, you should insert the following statement at the bottom of the Form 872 by placing an asterisk (*) after the caption:

This is with respect to the consolidated return liability of [REDACTED] and Subsidiaries for the consolidated group's [REDACTED] and [REDACTED] years.

Also, we request that you follow the procedures set forth below to ensure compliance with I.R.C. § 6501(c)(4)(B). Section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; or 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time.

The required notice must be provided each time an extension is requested. The legislative history of this provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment. Congress expressed concern that in some cases taxpayers were not fully aware of their rights to refuse to extend the statute of limitations, and have felt that they had no choice but to agree to extend the statute of limitations upon the request of the Service. See H.R. Conf. Rep. No. 105-599 at 286 (1998).

You should be aware that, under routine procedures, which have been established for opinions of this type, we have referred this opinion to the National Office for review. That review might result in modifications of the conclusions herein. You

should not solicit Forms 872 based on this advice until you receive a supplemental memorandum wherein we finalize our opinion. We will inform you in writing of the result of the review as soon as we hear from the National Office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702.

JODY TANCER
Associate Area Counsel
Brooklyn

By: _____
ROSE E. GOLE
Attorney